



[3410-11-P]

DEPARTMENT OF AGRICULTURE

Forest Service

RIN 0596-AC73

Burned Area Emergency Response, Forest Service

AGENCY: Forest Service, USDA.

ACTION: Notice of interim directive; request for public comment.

SUMMARY: The Forest Service is issuing an interim directive to guide its employees in revised procedures for Burned Area Emergency Response. The interim directive provides direction and guidance specific to assessing, planning and implementing post-fire emergency response actions on National Forest System (NFS) lands to ensure consistent and adequate analyses for evaluating post-fire risks and determining appropriate and cost-effective response actions. This interim directive supersedes the existing directive located at FSM 2523. Public comment is invited and will be considered during development of the final directive.

DATES: Comments must be received in writing by **[FEDERAL REGISTER: Insert date 30 days from date of publication in the FEDERAL REGISTER.]**

ADDRESSES: Submit comments electronically through the Internet web site at <http://www.regulations.gov> or mail written comments to U.S. Forest Service, Attn: Director, Watershed, Fish, Wildlife, Air and Rare Plants, Mail Stop 1121, 1400 Independence Ave S.W., Washington, DC 20250-1121. If comments are sent by electronic means, please do not send duplicate comments via regular mail.

All comments, including names and addresses when provided, will be placed in the record and are available for public inspection and copying. Persons wishing to inspect the comments received on this interim directive may do so in the Office of the Director, Watershed, Fish, Wildlife, Air and Rare Plants, U.S. Forest Service, 3rd Floor-Northwest, Sidney R. Yates Federal Building, 201 14th Street, SW, Washington, D.C., between 8:30 a.m. and 4:00 p.m. on business days. Those wishing to inspect comments are encouraged to call ahead at 202-205-1167 to facilitate access to the building.

FOR FURTHER INFORMATION CONTACT: Penny Luehring, Watershed, Fish Wildlife, Air and Rare Plants Staff, 333 Broadway SE, Albuquerque NM 87102, 505-842-3141 or pluehring@fs.fed.us. Individuals who use telecommunication devices for the deaf (TDD) may call the Federal Information Relay Service (FIRS) at 1-800-877-8339 between 8:00 a.m. and 8:00 p.m., Eastern Standard Time, Monday through Friday.

SUPPLEMENTARY INFORMATION:

Background and Need for the Interim Directive

The Forest Service has administered a Burned Area Emergency Response (BAER) program for over 30 years. The objective of the BAER program is to rapidly assess burned areas to identify post-wildfire threats to human safety, property and critical natural or cultural resources on National Forest System lands and take immediate and reasonable actions to manage unacceptable risks. The last substantive changes to the Forest Service BAER policy were in 2004. Since that time, over 10,000,000 acres of National Forest System lands have burned and the proportion of acreage burned at a high severity level has increased annually. Dry conditions, areas of tree mortality due to bark

beetle infestations and hazardous fuels buildup are creating conditions that make the outlook for more and bigger fires almost certain. Also during that time, concerns on rising costs in the fire operations program have prompted increased efforts to improve cost efficiencies. These cost issues affect the Forest Service BAER program since funding for this program resides in the fire operations budget.

The increasing acres of burned land combined with fiscal concerns have prompted new management challenges for which existing policy is inadequate. The current FSM 2523 direction often fails to provide the specificity for determining when true post-fire emergencies may exist and what techniques exist to effectively mitigate or manage these emergencies in a fiscally prudent manner. The interim directive provides a consistent framework and terminology for assessing risk and making decisions regarding appropriate emergency response actions. It also incorporates changes that provide for increased cost-savings.

Summary of Revisions

Minor technical and editorial changes were made throughout the chapter. Substantive changes are listed and described below.

FSM 2523.01 – Authority

This section includes an updated reference regarding the legal authority to enter into Watershed Restoration and Enhancement Agreements (Wyden Amendment authority). Section 2523.53 explains the conditions under which Wyden Amendment authority may be appropriate in the BAER program.

FSM 2523.02 – Objectives

This sentence was revised to emphasize the emergency nature and focused scope of the BAER program. The revised objective is “To identify imminent post-wildfire threats to human life and safety, property and critical natural or cultural resources on National Forest System lands and take immediate actions, as appropriate, to manage unacceptable risks.”

2523.03 – Policy

Several changes were made in this section. The requirement for performing BAER assessments on all fires, regardless of size, was changed to only those fires 500 acres and larger. An internal program evaluation has demonstrated that there is seldom a request for treatment made for fires smaller than 500 acres. Removing the mandatory requirement to perform assessments on these small fires, given that requests for treatment are so infrequent, has the potential to provide time and cost savings. An option has been provided to allow for performing assessments on smaller fires when potential threats to human life and safety, property, or critical natural or cultural resources may exist. The term “wildland fire” in this section was replaced to “wildfire” to be consistent with the Federal Wildland Fire Management Policy. A sentence was added to emphasize that the critical values addressed by the BAER program are limited to those listed in a new exhibit (FSM 2523.1, exhibit 01). Clarification was provided to ensure that any planned response actions are limited to those likely to substantially reduce risks within the first year. Changes were also made to limit the treatment of invasive species under BAER authority and to limit funding to one year to more closely align with the emergency nature of this program. Stricter requirements are included for justifying the use of BAER

funding for repair or replacement of previously installed emergency stabilization measures. The policy on monitoring using BAER funding was clarified to describe the limited purpose for BAER monitoring. Changes were also made to clarify the criteria for determining when BAER treatments are appropriate in wilderness areas. A policy statement was added explicitly stating that BAER is not appropriate for non-emergency rehabilitation and restoration or to correct undesirable conditions that existed prior to the fire.

2523.04 – Responsibility

Changed the caption from “Director, Watershed and Air Management Staff, Washington Office” to “Washington Office, Director, Watershed, Fish, Wildlife, Air, and Rare Plants Management Staff” and sets forth additional safety responsibilities at that director level.

Added responsibilities for safety and monitoring-needs identification at the regional forester level and clarified the conditions under which regional foresters may extend the seven-day assessment timeline. Established additional responsibility at the regional forester level for monitoring planned and actual regional BAER expenditures.

Added forest supervisor responsibility for pre-season preparedness with an emphasis on safety. Added forest supervisor responsibility for initiating and ensuring communication with appropriate Federal, Tribal, State, county, and local emergency response agencies regarding potential threats that may exist downstream of National Forest System lands and clearly communicating to those agencies the limits of Forest Service authorities.

Changed caption from “District Rangers” to “Forest, Grassland, Prairie, Area Supervisors and District Rangers”, for the purpose of combining BAER implementation, monitoring and reporting responsibilities into shared responsibility at the unit and district levels. Also in this section, additional safety responsibilities are set forth for BAER implementation and monitoring activities.

2523.05 – Definitions

Added the source references to the existing definitions of “Emergency Stabilization”, “Burned-Area Rehabilitation” and “Burned-Area Restoration”. Added new definitions for “Burned-Area Emergency”, “Risk”, and “Wildfire”.

2523.05 – Timeframes

Clarified that final accomplishment reports are due within 60 days of completing response activities, rather than 60 days from monitoring completion.

2523.1 – Burned-Area Emergency Assessment

Expanded this section to better clarify the process for conducting Burned-Area assessments, emphasizing the progression from risk assessment to planned actions in a sequential and logical fashion. The steps are: 1) evaluate potential threats to critical values; 2) determine the risk level for each threat; 3) identify situations where unacceptable risks exist; 4) develop risk management objectives; 5) design response actions that meet the objectives; 6) evaluate potential response actions on likelihood for timely implementation, effectiveness in reducing the risk, feasibility and cost. Clarified this section to encourage consultation with Tribes for assistance in identifying critical cultural resource values.

Added two new exhibits to this section. Exhibit 01 lists the values considered critical under the BAER program to provide focus for the risk assessment and associated emergency response action planning processes. These values include human life, safety, high value property, important natural resources (high value water, soil productivity, hydrologic function, critical habitat for federally listed threatened or endangered species, and plant communities not currently negatively affected by invasive species or noxious weeds) and important cultural resources (cultural resources listed on or potentially eligible for the National Register of Historic Places, Traditional Cultural Properties and Indian Sacred Sites) on National Forest System lands.

Exhibit 02 is a qualitative risk assessment tool that compares the probability of damage or loss to the expected magnitude of consequences and assigns a risk level using five categories that range from ‘very low’ to ‘very high’. Risk levels of ‘high’ and ‘very high’ are considered ‘unacceptable’ (and ‘intermediate’ is considered ‘unacceptable’ when the value is human life or safety). The exhibit also defines the terms ‘probability of damage or loss and magnitude of consequences’ which provide the justification for emergency response actions, including emergency stabilization in the BAER program.

2523.2 – Emergency Response Actions

Clarified that BAER actions are response actions necessary to control the immediate impacts of a post-fire emergency and fall within the NEPA provisions for such actions described in 36 CFR 220.4 b (1). These NEPA provisions allow the responsible official to take necessary actions to control the immediate impacts of the emergency to mitigate harm to life, property or important natural or cultural resources. When taking such actions, the responsible official shall take into account any probable environmental

consequences of the emergency action(s) and mitigate foreseeable adverse environmental effects to the extent practical.

Added a paragraph that describes the appropriate notification requirements when hazardous or unsafe conditions are identified and to emphasize the need to coordinate and cooperate with the appropriate Federal, State or local response agencies when flooding or other threats may continue downstream of National Forest System lands.

Clarified the hierarchy for emergency response decision strategies; describing the preferred order starting with natural recovery, to administrative closure, and then to stabilization actions. Improved the descriptive guidelines for employing response actions involving administrative closure and access control.

Removed the description of specific techniques for treatments involving large structures and cultural sites. This is technical guidance and more appropriate for inclusion in the Forest Service Handbook. A paragraph was added to describe how BAER funding should be used to implement administrative closures. The paragraph on appropriate response actions in wilderness areas was expanded to clearly describe the unique circumstances that would justify BAER actions in wilderness areas. Added guidance to the invasive species section to reinforces the one-year limitation on that type of treatment and include a reference to Forest Service Manual 2900 for general guidance on invasive species management.

2523.3 – Monitoring

Expanded this section to clarify the types of monitoring appropriate for BAER funding. It contains a general description of BAER implementation and effectiveness

monitoring. Effectiveness monitoring is divided into three levels, and this section describes the purpose, guidelines and planning responsibilities for each level.

2523.4 – Suppression-Damaged Areas

Clarified that costs for suppression-damage rehabilitation activities are charged to the fire incident and not to BAER.

2523.5 – Financing

Changed the caption from “Financing” to “Use of Funds” and added the reference to the Forest Service Handbook on Appropriation Use (FSH 6509.11g) which provides the overall direction on appropriate use of agency funds, including those used in BAER. Removed the guidance on approval responsibility and non-emergency rehabilitation, because it was redundant to that provided elsewhere in the directive.

Revised direction in this section to allow all wildfires regardless of origin to be potentially eligible for BAER. The original direction had stated that wildfires that started by way of planned ignitions (prescribed fires) could not qualify for BAER assessment or response actions.

Added additional clarification to identify the appropriate Forest Service coordination and cooperation actions when other Federal land is burned or at risk for post-fire damage. Updated the reference to reflect the current Interagency Agreement between the Department of the Interior and Forest Service for cooperation in fire management and BAER cooperation. Added direction to stress the importance of Forest Service coordination with other government agencies to identify shared risk management responsibilities for other Federal and non-Federal lands. Added a reference to the

appropriate Forest Service Manual and Handbook for guidance on agreement requirements when using the Wyden authority.

2523.6 – Human Resources

Reorganized this section to improve clarity. Established new codes and captions for the categories of “Safety” and “Pay Provisions”. Replaced previous specific guidance with a reference to the Incident Business Management Handbook (FSH 5109.34) as the source for direction on work/rest and driving/rest requirements that apply to BAER personnel.

2523.7 – Reporting

Added information specifying the type of information required in the final accomplishment report.

2523.8 – Controls

Removed specific direction regarding frequency of activity reviews and types of performance review(s) from this section. Instead, added a reference was added to FSM 1410, which provides overall guidance for Forest Service program and activity reviews.

2523.9 – Coordination between BAER and other Recovery Programs

Added a new section setting forth direction on coordination between BAER and other, non-emergency, rehabilitation and long-term post-fire recovery programs.

Regulatory Certifications

Environmental Impact

This interim directive revises the administrative policies and procedures for conducting Burned Area Emergency Response activities on National Forest System lands. Agency regulations at 36 CFR 220.6(d)(2) (73 FR 43093) exclude from

documentation in an environmental assessment or impact statement “rules, regulations, or policies to establish Service-wide administrative procedures, program processes, or instructions.” The Agency has concluded that this interim directive falls within this category of actions and that no extraordinary circumstances exist which would require preparation of an environment assessment or environmental impact statement.

Regulatory Impact

This interim directive has been reviewed under USDA procedures and E.O. 12866 on regulatory planning and review. The Office of Management and Budget (OMB) has determined that this directive is non-significant for purposes of E.O. 12866. This action to clarify agency direction will not have an annual effect of \$100 million or more on the economy, nor will it adversely affect productivity, competition, jobs, the environment, public health and safety, or State or local governments. This interim directive will not interfere with an action taken or planned by another agency, nor will it raise new legal or policy issues. Finally, the interim directive will not alter the budgetary impact of entitlement, grant, user fee, or loan programs or the rights and obligations of beneficiaries of those programs.

This interim directive has been considered in light of Executive Order 13272 regarding proper consideration of small entities and the Small Business Regulatory Enforcement Fairness Act of 1996 (SBREFA), which amended the Regulatory Flexibility Act (5 U.S.C. 601 *et seq.*). A small entities flexibility assessment has determined that this action will not have a significant economic impact on a substantial number of small entities as defined by SBREFA. This interim directive is focused on National Forest

System Burned Area Emergency Response activities and imposes no requirements on small or large entities.

Federalism

The Agency has considered the interim directive under the requirements of E.O. 13132 on federalism and has determined that the directive conforms with the federalism principles set out in this Executive order; will not impose any compliance costs on the States; and will not have substantial direct effects on the States, the relationship between the Federal Government and the States, or the distribution of power and responsibilities among the various levels of government. Therefore, the Agency has determined that no further assessment of federalism implications is necessary.

Consultation and Coordination with Indian Tribal Governments

In accordance with Executive Order 13175 of November 6, 2000, “Consultation and Coordination with Indian Tribal Governments,” and in recognition of the unique government-to-government relationship with federally recognized Indian tribes, the Agency has consulted with tribal officials and considered the results of consultation in developing the interim directive.

On May 24, 2011, the Deputy Chief for the National Forest System sent letters to the Regional Foresters, Station Directors, Area Director, IITF Director, Deputy Chiefs, and Washington Office Directors instructing them to conduct government-to-government consultation with federally recognized tribes on the proposed BAER directive revisions. The Forest Service considers tribal consultation as an ongoing, iterative process that runs from development of proposed directives through issuance of final directives.

From late May 2011 to October 2011, Forest and Grassland Supervisors and District Rangers in each Region made contacts in person and in writing to the Tribes within their area of jurisdiction. All comments received were considered in development of the interim directive.

The Agency received four comments from two tribes with interests in National Forest System land in the Southwestern, Pacific Southwest and Intermountain West regions. One comment noted the directive lacked emphasis on protection of heritage resources and cultural values. Two comments addressed the 500 acre minimum size limit for assessment and suggested that there should be an exception if cultural resources were affected. One comment stated that there was no provision for Tribal consultation and that tribes should be involved in the BAER process, especially if cultural sites are in the project area. These comments all resulted in changes incorporated into the interim directive.

The Agency has also determined that this interim directive does not impose substantial direct compliance costs on Indian tribal governments nor does it mandate tribal participation. Instead, it provides guidance to authorized officers to consult with affected tribes to assist in identifying critical cultural resources, and it seeks to ensure emergency stabilization actions do not negatively affect cultural resources.

No Taking Implications

The Agency has analyzed the interim directive in accordance with the principles and criteria contained in E.O. 12630. The Agency has determined that the directive does not pose the risk of a taking of private property.

Civil Justice Reform

The interim directive has been reviewed under E.O. 12988 of February 7, 1996, “Civil Justice Reform”. At the time of adoption of this directive, (1) all state and local laws and regulations that conflicts with this directive or that impede full implementation of this directive were preempted; (2) no retroactive effect was given to the directive; and (3) administrative proceedings are not required before parties can file suit in court to challenge its provisions.

Unfunded Mandates

Pursuant to Title II of the Unfunded Mandates Reform Act of 1995, (2 U.S.C. 1531-1538), the Agency has assessed the effects of the interim directive on State, local, and Tribal governments and the private sector. The directive will not compel the expenditure of \$100 million or more by any State, local, or tribal government or anyone in the private sector. Therefore, a statement under section 202 of the act is not required.

Energy Effects

The Agency has reviewed the interim directive under E.O. 13211 of May 18, 2001, “Actions Concerning Regulations That Significantly Affect Energy Supply, Distribution, or Use.” The Agency has determined that the directive does not constitute a significant energy action as defined in the Executive Order.

Controlling Paperwork Burdens on the Public

The interim directive does not contain any additional record-keeping or reporting requirements or other information collection requirements as defined in 5 CFR part 1320 that are not already required by law or not already approved for use and therefore imposes no additional paperwork burden on the public. Accordingly, the review

provisions of the Paperwork Reduction Act of 1995 (44 U.S.C. 3501 *et seq.*) and its implementing regulations at 5 CFR part 1320 do not apply.

Thomas L. Tidwell,
Chief, Forest Service.

May 31, 2013

Date

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